Supreme Court of the United States.

OCTOBER TERM. 1897.

No. 560.

JOHN BUDZISZ AND AUGUST BUDZISZ ALIAS ANASTASIUS BUDZISZ, PLAINTIFFS IN ERROR,

vs.

ILLINOIS STEEL COMPANY, DEFENDANT IN ERROR.

ARGUMENT OF PLAINTIFFS IN ERROR.

Upon the motion to dismiss the writ of error in the case of John Budzisz et al. vs. Illinois Steel Company, made by the Illinois Steel Company, the plaintiffs in error desire to call to the attention of the Court the following reasons why the motion should be denied.

Some of the facts pleaded in the answer, both as matters of defense and counterclaim, as well as portions of the prayer for relief, were the following:

13 That the defendants are informed and verily believe that the Indian title to Lot One (1) of Fractional Section Eight (8), Township Twenty-two (22) North, Range Twenty (20) East, which contained 41.80 acres, and a joint entry of which was made by the said Increase Claflin and Daniel Darnell on the 30th day of July, 1835, at the Green Bay, Michigan Territory, Local United States Land Office, was not extinguished on the 29th of May, 1830, and upon that day was in the Indians; and that the Indian title to the aforesaid Lot One (1) of Fractional Section Eight (8), Township Twenty-two (22)
14 North, Range Twenty (20) East, with other lands, was conveyed, as the defendants are informed and verily believe, to the United States under and by virtue of several treaties with the Menomonee tribe of Indians, as follows, to-wit:

* * * * * * * * * *

16 That your defendants are informed and verily believe that thereafter a treaty was made, and dated on the 18th day of October, 1848, between the United States and the Menomonee tribe of Indians whereby, among other things, "the said Menomonee tribe of Indians agree to cede and do hereby cede, sell and relinquish to the United States all their lands in the State of Wisconsin, wherever situated," and which treaty was duly ratified on the 23d of January, 1849.

That the defendants are informed and verily believe that under and by virtue of the sixth subdivision of the aforesaid treaty of the 8th day of February, 1831, "the

Menomonee tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox River and Green Bay, with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly."

* * * * * * * * * *

That the defendants are informed and verily believe that for the same reason the patent of the United States dated the 1st day of September, 1838, to Alexander J. Irwin, assignee of Increase Claflin and Daniel Darnell, for the said Lot Number One (1) of Fractional Section Eight (8), in Township Twenty-two (22) North, of Range Twenty (20) East, in the district of land subject to sale at Green Bay, was and is null and void.

* * * * * * * * * *

That the defendants are informed and verily believe that the patent of the United States dated the 16th day of April, 1838, to Albert G. Ellis, assignee of Daniel Darnell, based upon pre-emption float Certificate No. 2, Green Bay Series, under and by virtue of the laws of the United States and the aforesaid treaties herein set forth, was and is null and void, and in no way extinguished the title of the Government of the United States to the aforesaid Lots numbered One (1) and Two (2) of Fractional Section Thirty-three (33), Township Seven (7) North, Range Twenty-two (22) East.

* * * * * * * * * *

Wherefore, the defendants ask and demand that the aforesaid joint entry of Increase Claflin and Daniel Dar-

nell at the United States Land Office at Green Bay, Michigan Territory, on the 30th day of July, 1835, to Lot One (1) of Fractional Section Eight (8), Township Twenty-two (22) North, Range Twenty (20) East, containing 41.80 acres, be declared null and void and can-
27 celed; * * * * * that the pre-emption float entry Number Two (2), made on the 30th day of July, 1835, at the United States Land Office at Green Bay, Michigan Territory, by the aforesaid Daniel Darnell, to Lots One (1) and Two (2) of said Fractional Section
28 Thirty-three (33), Township Seven (7) North, Range Twenty-two (22) East, be declared null and void and canceled.

* * * * * * * * * * *

And further, the defendants ask and demand that the complaint of the plaintiff herein be dismissed with costs.

RUBLEE A. COLE,
Attorney for Defendants.

Both the construction and the validity of treaties of the United States, made under its authority, are involved, and arise, and are drawn in question in this case.

The Supreme Court of the United States, in the case of Worcester vs. Georgia, 6 Peters, 515, 540, in the opinion by Chief Justice Marshall, declares:

"This plea was overruled by the Court, and the prisoner, being arraigned, pleaded not guilty. The jury found a verdict against him, and the Court sentenced him to hard labor in the penitentiary for the term of four years.

"By overruling this plea, the Court decided that the matter it contained was not a bar to the action. The plea, therefore, must be examined for the purpose of determining whether it makes a case which brings the party within the provisions of the twenty-fifth section of the 'Act to establish the judicial courts of the United States.'

"The plea avers that the residence charged in the indictment was under the authority of the President of the United States, and with the permission and approval of the Cherokee Nation. That the treaties subsisting between the United States and the Cherokees acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America. That the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void.

* * * * * * * * * *

"Let the averments of this plea be compared with the twenty-fifth section of the judicial act. * * * * 'Where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of,

or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission.'

* * * * * * * * * *

"The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood.

* * * * * * * * * *

The charters contain passages showing one of their objects to be the civilization of the Indians and their conversion to Christianity—objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims, and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends. Instead of rousing their resentments by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich pres-

ents. The English, the French and the Spaniards, were equally competitors for their friendship and their aid. * * * * * (Page 546.)

* * * * * * * * * * *

"There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them." * * * * (Page 551.)

In their answer and throughout all the proceedings in the case, John Budzisz and Anastazius Budzisz asserted rights and invoked the protection of Indian treaties and the laws and constitution of the United States.

From Harcourt vs. Gaillard, 12 Wheaton, 523:

"It is true, that the power of the crown was at that time admitted to be very absolute over the limits of the royal provinces, but there is no reason to believe that it had ever been exercised by any means less solemn and notorious than a public proclamation: and although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory,

was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit by a solemn grant from the crown to the lords proprietors, from whom in fact she had wrested it by a revolution even before the rights of the proprietors had been bought out by the crown.

But this is not the material fact in the case; it is this, that this limit was claimed and asserted by both of those states in the declaration of independence, and the right to it was established by the most solemn of all international acts, the treaty of peace. It has never been admitted by the United States that they acquired any thing by way of cession from Great Britain by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle the soil and sovereignty within their acknowledged limits, were as much theirs at the declaration of independence as at this hour."

The United States Supreme Court, in Chotard vs. Pope, 12 Wheaton, 586, declares:

"Under the operation of these words, assuming the right to appropriate any unpatented land in the two states, the complainants have asserted the privilege of entering a tract of land, which covers the site surveyed and laid off for the town of Claiborne, in the State of Alabama. The proper officers have refused to issue the ordinary evidences of title, and have gone on to sell out the town lots, according to law. This bill is filed against the register of the land office, and the purchaser of one of the town lots, to compel them to make titles to complainants.

On behalf of the United States, it is contended that the literal meaning of the terms of the act is limited and restrained by the context, and by considerations arising out of the general system of land laws of the United States, into which this act is ingrafted; and that, so construed, the right granted is limited to that description of lands which are liable to be taken up at private sale." * * * * *

From Missouri, Kansas & Texas Ry. Co. vs. Roberts, 152 U. S., 114, 117, 118:

"The right of the United States to dispose of the fee of land occupied by them (i. e., the Indians), it added, has always been recognized by this Court from the foundation of the government. There are, however, certain well established doctrines controlling the action of the government, which can always be invoked to prevent hasty and improvident action against the Indians. *It has always been held that the occupancy of the lands set apart by statute or treaty with them for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands.*

And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and pre-emption."

The record in this case of Budzisz et al. vs. Illinois Steel Company further discloses the fact that the pretended chain of title of the Illinois Steel Company to the land in controversy in this case comprises as certain links in such chain various tax deeds from Milwaukee County and the City of Milwaukee, which were issued

because of the non-payment of taxes by the persons pretending to claim title under Darnell and under Ellis as assignee of Darnell. Similar exceptions were reserved as to these tax deeds and that the lands were not subject to taxation by reason thereof. In this state of the case, plaintiffs in error insist that there is no privity between the Illinois Steel Company and Darnell; nor between the Illinois Steel Company and Ellis as assignee of Darnell. Hussman vs. Durham, 165 U. S., 144, 147.

As was stated in the case of Hussman vs. Durham, 165 U. S., 144, which was a writ of error to the Supreme Court of the State of Iowa:

"A motion to dismiss was submitted by the defendant in error, but as the Supreme Court of the state held that the equitable title apparently conveyed by the proceedings in the United States Land Office in 1858 was of no effect, and the tax titles based thereon of no validity, it is apparent that a right claimed under the authority of the United States was decided, and, therefore, this Court has jurisdiction.

On the merits of the case we remark that while it is undoubtedly true that when the full equitable title has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to state taxation, Carroll vs. Safford, 3 How., 441; Witherspoon vs. Duncan, 4 Wall., 210; yet until such equitable title has passed and while the land is still subject to the control of the government it is beyond the reach of the state's power to tax. Railway Company vs. Prescott, 16 Wall., 603; Railway Company vs. McShane, 22 Wall., 444; Tucker vs. Ferguson, 22 Wall., 527, 572; Colorado Company vs. Commissioners, 95 U. S., 259. There-

fore the validity of the tax titles held by plaintiff in error depends upon the question whether the equitable title to the land had passed from the government to Craig."

Hussman vs. Durham, 165 U. S., 144, 147.

The appeals of Holden vs. Joy and Warner vs. Joy, 17 Wallace, 211, are from the Circuit Court of the United States for the District of Kansas, and as well as the case of Warner vs. Joy, 17 Wallace, 253, note, arising on a writ of error to the Circuit Court of the United States to a judgment of that Court in an action for the recovery of land, sustain the jurisdiction of this Court in this case of Budzisz vs. Illinois Steel Company. Clearly the Supreme Court had jurisdiction in these cases prior to the act of March 3, 1891, upon appeal or writ of error, to determine the construction and validity of the Indian treaties therein involved. It is the intention of section 5 of the act of March 3, 1891, that such jurisdiction should still remain in the United States Supreme Court upon a writ of error direct to the Circuit Court of the United States. The validity and construction of the Indian treaties in those cases were drawn in

question substantially in the same manner as in this case.

The case of Holder vs. Aultman, Miller & Company, decided by United States Supreme Court January 10, 1898, is a writ of error to the Circuit Court of the United States for the Eastern District of Michigan, and is authority to uphold the jurisdiction of this Court in this case upon the questions as to the validity and construction of the Indian treaties which were drawn in question in this case and to the vested rights which were also drawn in question in the lower Court.

Mr. Justice Gray, in that case, says:

"The jurisdiction of this Court does not depend upon the question whether the right claimed under the constitution of the United States has been upheld or denied in the Court below."

In the case of Penn. Mutual Life Insurance Company et al. vs. City of Austin et al., which was decided January 3, 1898, the Court says:

"The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition, 'that the constitution or a law of the state.' * * * * Of course, the claim must be real and colorable, not fictitious and fraudulent."

* * * * * * * * * *

"The argument, then, in effect, is that the right to a direct appeal to this Court does not exist where it is claimed that a state law violates the constitution of the United States, unless the claim be well founded. But

it can not be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. * * * * * These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record. Horner vs. United States, 143 U. S., 571 (36: 267)."

The case of Owings vs. Norwood's Lessee, 5 Cranch, 344, was a writ of error to the Court of appeals of the State of Maryland, in an action of ejectment, and the Court held that: "The interest by debt intended to be protected by the treaty, must be an interest holden as a security for money at the time of the treaty; and the debt must still remain due." And further: "*If Scarth or his heirs had claimed, it would have been a case arising under a treaty.* But neither the title of Scarth, nor of any person claiming under him, can be affected by the decision of this cause." The Court did not dismiss the writ of error upon motion but heard the case upon its merits and determined the proper construction of the treaty after such hearing. This is apparent from the case itself, as well as from the statement in regard to it in the case of Crowell vs. Randall, 10 Peters, 368, on page 393, as follows:

"The earliest case is Owings vs. Norwood's Lessee, 5 Cranch, 344. In that case, it clearly appeared that the construction of a treaty was before the State Court; and that it was decided that the right of the party was not protected by the treaty. This Court affirmed the decision of the State Court."

It is very clear that Owings vs. Norwood's Lessee, 5 Cranch, 344, is not in point to authorize the dismissal of the writ of error in this case on motion.

The case of Beecher vs. Wetherby, 95 U. S., 517, cited by defendant in error, upon the argument in behalf of its motion to dismiss the writ of error herein, does not seem to be in point in this case either upon the question of the treaties or upon the jurisdiction of the Court in any manner to sustain the contention of the defendant in error.

The action of replevin in that case in the Circuit Court of the United States gave the Court occasion to construe certain laws and treaties of the United States with the Menomonee nation of Indians. The lands, from which the timber was cut, were in the county of Shewano, Wisconsin, *north and west of the Fox River*. Certain questions which arise in this case could not, in any way, have arisen in Beecher vs. Wetherby; or, if they could have arisen, were, in fact, not raised. The case arose prior to the act of March 3, 1891, establishing the Court of Appeals and defining the jurisdiction of that Court and of the Supreme Court. The Supreme Court on writ of error prior to act of March 3, 1891, had jurisdiction of the case; and had the case arisen since that act, instead of prior to it, it is believed the United States Supreme Court would have had jurisdiction of it on writ of error. The plaintiff in the case of Beecher vs. Wetherby, although relying upon patents of the United States, did not recover in either the lower Court or in the United States Supreme Court, which clearly indicates that a patent of the United States is not "invulnerable," as charged by Judge Seaman in this case.

The lower court *would not permit the defendants, under the general denial in their answer*, to put the plaintiff to proof of its title or right of possession; nor would the Court permit the defendants to prove any of the facts set up in their answer.

Two of the errors assigned are:

33. The Court erred in using the following language in the charge to the jury: "He entered a little less than six years ago upon this property, put up his shanty as a squatter, as an intruder, as the law names it, without any right or claim."

37. The Court erred in using the following language in the charge to the jury: "Aside from that a patent from the government is invulnerable."

The bill of exceptions which is contained in the record is a truthful record of the proceedings in the Circuit Court. Such bill of exceptions actually has the signature of the judge to the same authenticating the truth and accuracy of the bill. All oral testimony, substantially, was received against objections or subsequently moved to be stricken out. The bill of exceptions in this case was presented to the Court some days before it was finally signed as appears from the signed endorsement of the judge in his proper handwriting on the cover of the same. The bill of exceptions in this case is in proper form; and sufficient both as to form and authentication under the rule indicated by the United States Supreme Court in the case of Lees vs. United States, 150 U. S., 476, wherein the Court say, page 482:

"But whatever of force there is in this implication is overborne by the statement in the last sentence of what the judge did. By his signature and seal he authenticated the bill of exceptions, as prepared and presented to him. And all the facts and matters stated in that bill are by such authentication brought into the record for all purposes for which they may legitimately be used."

If the transcript of the proceedings in the Circuit Court authenticated by the signature of the judge is not a bill of exceptions, it must be a sufficient certificate of a question of jurisdiction. The record shows that such a question of the jurisdiction of the Circuit Court arose in that Court and that a certificate of a question of jurisdiction was requested. No particular form of certificate is essential.

United States vs. Jahn, 155 U. S., 109, 112, 113.
New Orleans vs. Benjamin, 152 U. S., 411.
McLish vs. Raff, 141 U. S., 661.

If the contention of the Illinois Steel Company is correct and if the float entry of Darnell was valid and the patent to Ellis as assignee of Darnell is valid and if the partition proceedings in 1846 are valid, then there is a vested right in John Budzisz and Anastazius Budzisz to the lands in controversy. This claim was made in the lower Court.

City of Cincinnati vs. Lessees of White, 6 Peters, 434.
Green vs. City of Tacoma et al., 51 Fed. Rep., 622, 623.

Among others things the decree of partition, which was dated July 9, 1846, declared:

"And it is further ordered, adjudged and decreed that the said several parties and their heirs and assigns shall have a perpetual right of way and easement on the streets and alleys on said premises as laid out and designated on said map hereto annexed.

By the Court,

A. G. MILLER."

The Steel Company do not have and cannot have an assignment of such right of way and easement and can take nothing under this clause. It is a limitation on the rights of the parties to the decree; and not a reservation.

You can assign a reservation but cannot assign a limitation to the rights of parties to a decree.

The decree by its express limitation negatived any greater rights in the dedicators of said street; and the municipality of Milwaukee was in existence to take the grant for the public.

Cincinnati vs. White, 6 Peters, 431, see p. 439.

There was no reversion in the decree in the partition suit as to the street for the benefit of any of the parties to such suit. As was said in Robertson vs. Pickrell, 109 U. S., 608, as to a conveyance of a life estate by a deed without covenants or recitals as to any further interests of the grantors or of others:

"There is nothing in the nature of the estate which necessarily implies that the grantor is the owner of the reversion. The absence in the deed here of any reference to a reversionary interest would rather seem to negative such ownership."

Under the decree in partition there was an express dedication of the street to the public. At common law the legal title would have passed to the municipality and the equitable title to the public. Such a trust at common law would be an express trust. Under our statute of uses and trusts, the legal title passes to the public; and the legal and equitable title unite. This is a trust arising or resulting by implication of law

(Sec. 2076, R. S. Wis., 1878), valid as such in its creation, and vests the whole estate in the trustee (the municipality),subject only to the execution of the trust; and the public for whose benefit the trust was created takes no estate or interest in the lands, but may enforce the performance of the trust.

Sec. 2086, R. S. Wis., 1878.

The dedication to the city being a grant without limitations, there can be no contingent remainder. This is so because the public have a vested right in the street and have a perpetual right to enforce the trust.

Sec. 2086, R. S. Wis., 1878.

This street differs entirely from a street laid out under statutes where the public has a mere easement; and where under such statutes the title remains in the abutting owner.

Paine Lumber Co. vs. Oshkosh, 89 Wis., 449.

89 Wis., 449, is distinguished in 92 Wis., 118, p. 121.

The Supreme Court of Wisconsin and the Supreme Court of the United States both have held that a mortgagor out of possession cannot bring ejectment against a mortgagee in possession after condition broken. This is so because the mortgagor has only an equitable title.

Probst vs Brock, 10 Wallace, 519, 530, et seq.

Bryan vs. Brasius, 162 U. S., 415.

Bryan vs. Kales, 162 U. S., 111.

The mortgagor is not entitled to the possession except upon a contingency—(i. e. that he can get in).

The Illinois Steel Company is not in as favorable a position as a mortgagor out of possession with his mortgagee in possession after condition broken.

Section 3074, R. S., as to ejectment. Plaintiff must show title and right of possession at commencement of action.

Ejectment cannot be maintained by the holder of the equity of redemption against the mortgagee or his assigns lawfully in possession.

Gillett vs. Eaton, 6 Wis., 30.
Tallman vs. Ely, 6 Wis., 244.
Stark vs. Brown, 12 Wis., 572.
Hennesy vs. Farrell, 20 Wis., 42.
Scheiber vs. Casey, 48 Wis., 208, p. 214.

Nor by cestui que trust or other person having only equitable interest.

Gillett vs. Treganza, 13 Wis., 472.
Eaton vs. Smith, 19 Wis., 537.
Kinney vs. Dexter, 81 Wis., 80, p. 81.

In conclusion, in respect to section 8 of chapter 561 of the Laws of 1891 (Act of March 3, 1891), (Vol. 26, Stat. at Large, 1099), to the effect as follows:

Sec. 8. THAT SUITS BY THE UNITED STATES TO VACATE AND ANNUL ANY PATENT HERETOFORE ISSUED SHALL ONLY BE BROUGHT WITHIN FIVE YEARS FROM THE PASSAGE OF THIS ACT, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

A somewhat similar point arose in case of Lindsey et al. vs. Lessee of Miller, 6 Peters, 666, wherein the Court, among other things said:

"The entry and survey of the defendants were made before the deed of cession; * * * * *."

In the case of Goodtitle, Lessee of Parker, against Baldwin, 11 East's Reports, 488, upon a motion to set aside a verdict in ejectment for the defendant and for a new trial, Lord Ellenborough, C. J., said:

"No grant from the crown can be presumed, against the express provision of the Stat., 20 Car., 2, to have been made to the lessor's father in his life time; and unless it had been competent to the crown to make such a grant, how can the lessor of the plaintiff who claims under his father, and who has been out of possession since his father's death, have any title? No grant can be presumed in his favor. * * * * * * * * * * * * * * * * ; *and the lessor of the plaintiff must recover against the defendant by the strength of his own title, and not by the weakness of the defendant's* title; and the Stat., 20 Car., 2, bars any presumption of title in favor of the lessor in this case."

In the foregoing case the lessor of the plaintiff relied upon the statute of the 9 Geo., 3, c. 16, which is

similar to Sec. 8, Act of March 3, 1891 (Vol. 26, Stat. at Large, 1099), which the English Court holds "does not give a title."

An entry of lands which are legally reserved for other purposes is clearly void and the United States continues to hold the land "as if no entry had been made."

McCarthy vs. Mann, 19 Wallace 20, 32.

Thus the entry of Daniel Darnell of lots one (1) and two (2) of fractional section thirty- three (33), township seven (7) north, range twenty-two (22) east, to which the Indian title either was not extinguished or which land was reserved under the terms of Indian treaties for Indian occupancy, was clearly void, and "the United States held the land as if no entry had been made."

McCarthy vs. Mann, 19 Wallace 20, 32.

Thus the assignment by Daniel Darnell of the floating right entry to said land to A. G. Ellis was clearly void as were all deeds signed and executed by Ellis to any of the land included in his patent as assignee of Darnell of fractional section thirty- three (33), township seven (7) north, range twenty-two (22) east. Reference to the description in the patent will disclose that lots one (1) and two (2) are not mentioned in the patent, but the description in the patent is, as follows:

" * * * for fractional section thirty- three in township seven north, of range twenty-two east, in the district of lands subject to sale at Green Bay, Wisconsin Territory, containing seventy-seven acres and seventy hundreths of an acre, * * *."

Under the exceptions taken to the reception of the patent to Ellis as assignee of Daniel Darnell and to the reception of the receiver's certificate and receipt as to the assignment thereof by Daniel Darnell to Ellis, the defendants in the Circuit Court claimed that the various Indian treaties relied upon by them are a part of the law of the land and that by such treaties they were protected and that they claimed thereunder that it was the duty of the Circuit Court in each instance to exclude such evidence as under the law of the land the Court was bound to know and to hold that at the date of each and all and every of such instruments the land in question was either reserved for the occupancy of Indians or was in the occupancy of the Indians both by virtue of the original right and also by virtue of the guarantee of several treaties with the United States; and that each and all and every of such instruments was therefore void as distinguished from voidable and not entitled to be admitted in evidence.

Harcourt vs. Gaillard, 12 Wheaton 523, 529.

Lake Superior Ship Canal, Railway and Iron Company vs. Cunningham, 155 U. S., 354, pp. 373, 374.

No act was ever passed by Congress ratifying and confirming the Darnell entry or the assignment thereof to Ellis or the patent to Ellis as assignee of Darnell. Such an act for the relief of Poncin and those claiming under him, in the case of McCarthy vs. Mann, 19 Wallace, 20, was passed by Congress, and the validity of the entry and title of Poncin and the validity of the title of those claiming under Poncin depended wholly

upon such act of confirmation and ratification which was in effect a congressional grant. As was said in that case on page 32:

"The first entry by Poncin was clearly void, and the commissioner was right in setting it aside. *When the act in question was passed, the United States held the land as if no entry had been made. Being the absolute owners, they could grant it upon such terms and conditions as Congress might prescribe. The government united the powers of ownership and legislation, and both were exercised in passing the act.* The act declared, first, that the entry should be reinstated as of its original date, and that a patent should issue to Poncin; second, that the title should enure to the benefit of his grantees as he should have conveyed the land. *The law is explicit and there is no difficulty in carrying out its provisions. It must be liberally construed to effect the purposes of its enactment.* By Poncin's grantees was meant those claiming title under him. Those to whom he might have conveyed were no more intended to be beneficiaries under the act, than those holding remoter links in the same chain of title. When he paid his money and procured a certificate of entry pursuant to the act, an equity vested in each of those who would have held it, *if the original entry had been valid*, and when the patent issued, the legal title vested in the same parties. The act applied the doctrine of relation. It made no distinction between grantees with warranty and those without it. If there had been outstanding title bonds, they also would have been within the equity of the act, and the holders could have enforced them accordingly."

McCarthy vs. Mann, 19 Wallace, 20, 32.

The defendants in the lower Court having claimed that neither the equitable nor legal title ever passed to Daniel Darnell or to Ellis as assignee of Daniel Darnell nor to any one claiming under them because of the Indian treaties, further, upon the same ground, reserved exceptions that the lands were not subject to taxation by the city, county or state and that the tax deeds were void, under the laws and Constitution of the United States and should not be admitted in evidence. Such tax deeds were, however, admitted. This is an additional reason why the writ of error herein should not be dismissed.

John Budzisz and Anastazius Budzisz claim under the United States and are attempting to acquire title from the United States. The notice to quit was served upon them by the Illinois Steel Company in January, 1896.

The description in the patent is too indefinite to devest the fee. A portion of Fractional Section Thirty-three is East of the middle of the Milwaukee River which was the boundary of the Menomonee tribe; and the remaining portion is West of the middle of the Milwaukee River, which was the boundary, as defined in

the treaty at Prairie des Chiens in 1826, of the United Nation of Chippewa, Ottawa and Pottawatamie Indians.

Fractional Section Thirty-three (33) of Township Seven (7) North, Range Twenty-two (22) East, legally surveyed, did comprise more than seventy-seven acres and seventy hundreths of an acre.

The granting clause of the patent can not be limited by the words "containing seventy-seven acres and seventy hundreths of an acre."

Crown grants are construed strictly, and the introduction in a patent of general words of reference to a prior grant of the subject matter to the crown (i. e., in tam amplo modo as the grantor to the crown had it), will not extend the operation of a crown grant beyond the precise terms of the patent.

Rex vs. Copper, 5 Price, 217-268. (8. C., 19 R. R., 568.)

Where the operative words of a deed are clear and unambiguous, their meaning can not be altered by inference, from the recital, of a different intention.

Walsh vs. Trevanion, 19 L. J. Q. B., 458 (8. C. 15, Q. B. Ad. & El. (N. S.), 733).

Patterson, J., in Williams vs. Morgan, 15 Adolphus & Ellis, N. S., 782, 788, 789, said:

"* * * * * It might be necessary to show how it came that he who was at law leaseholder for a term of years ceased to pay any rent, or the like, which might be explained by proving that he had become in equity entitled to the fee."

From Polk's Lessee vs. Wendal et al., 9 Cranch, 87:

"The fact that this title occurred before the cession does not appear on the face of the grant. It is, of course, open to examination."

The Indian title was not legally extinguished on the 29th of May, 1830, nor on the 19th of June, 1834, nor at the date of the issuance of the patent in a sense which authorized the United States to grant the land.

From Fulton vs. M'Affee, 16 Peters, 149:

"From this statement of the case, it will appear, that the only right drawn in question was that claimed by M'Affee under his certificate. If that certificate was a good legal title, it was elder, and therefore superior, to the legal title *derived under the patents produced by the defendants.*"

From Clark vs. Smith, 13 Peters, 195:

"The ultimate fee (incumbered with the Indian right of occupancy) was in the crown previous to the revolution, and in the states of the Union afterwards, and subject to grant."

John Budzisz and Anastazius Budzisz claim under the United States and are attempting to acquire title from the United States. The notice to quit was served upon them by the Illinois Steel Company in January, 1896.

Upon the conclusion of the plaintiff's testimony in the Circuit Court, in behalf of the defendants, the counsel for the defendants made the following motion:

"Defendants' Counsel: I desire at this time to state that the defendants rely in this Court upon, and rest upon, several treaties of the United States with the Menominee tribe of Indians, as follows, to-wit:

The purported treaty of the date of the 8th February, 1831, and the supplemental article thereto dated February 17th, 1831, which were conditionally ratified by the Senate of the United States the 25th day of June, 1832, and the provisional ratifications thereof signed by the President of the United States on the 9th day of July, 1832;

And the purported treaty with the Menominee Indians dated 27th October, 1832, which was ratified by the Senate of the United States by the resolutions of said Senate on the 2d day of March, 1833; and such ratification, with the advice and consent of the Senate, signed by the President of the United States on the 13th day of March, 1833;

And also upon a certain treaty made by the United States, with and by and between the United States and the Menominee tribe of Indians, dated the 18th day of October, 1848; and which treaty was duly ratified on the 23d of January, 1849;

And also upon a treaty made at Chicago, in the State of Illinois, on the 26th day of September, A. D. 1833, between the United States and the United Nation of Chippewa, Ottawa and Pottawattamie Indians, and the articles supplementary thereto; and which said treaty was ratified by the Senate of the United States by two resolutions, one dated the 22d day of May, 1834, and the other the 11th day of February, 1835, and which treaty was proclaimed February 21, 1835; and relying on the same, the defendants move to strike out all the testimony introduced by the plaintiff herein.

Motion denied and the defendants except."

In Balls vs. Westwood, 2 Campbell's Reports, 11, Lord Ellenborough said:

"Had the defendant, upon the premises being seized by the lord of the manor, disclaimed holding of the plaintiff, and entered afresh under the new landlord, we might now inquire into the validity of the seizure, and consider who is legally entitled to the premises; but the same tenancy continues which was created by the original demise, and the tenant must still pay rent to the lessor whose title he then recognized."

"Upon like grounds the jurisdiction of this Court to re-examine the final judgment of a state Court can not arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such Court intended to assert a federal right."

F. G. Oxley Stave Co. vs. Butler County, 166 U. S., 648, 655.

Such a conception of the language of the treaty is incorrect. Such provision is a reservation and not a grant. The Indians always had the right to hunt and fish, until they should cede it.

The contention is that the treaty of February 8, 1831, and the supplemental articles thereto, never became binding upon the Menomonees until the treaty of 1848 with the Menomonees was ratified and proclaimed.

The agreement of October 22d, 1832, proclaimed as a treaty March 13th, 1833, arranged by Gov. Porter with the Menomonees, was not a treaty, because Gov. Porter was only authorized to obtain the best terms upon which the Menomonees would ratify the treaty of February 8th, 1831; as only the President of the United States has power, by and with the consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. (Sec. 2; Article 2; Cons. U. S.)

The letter of Hon. Lewis Cass, Secretary of War, to Gov. Porter, containing his instructions as to the conference at Green Bay with the Menomonee Indians, is filed with this argument.

The reservation to the Indians east of the Fox River and Green Bay by the terms of the treaty at its earliest date possible under the treaties was not extinguished until May 6th, 1835, IF THEN.

In the case of United States vs. Fitzgerald, 15 Peters, 407, the Court said:

"The first section of the act of the 19th of June, 1834, gives to every settler or occupant of the public lands, prior to the passage of that act, who was then in that possession and cultivated any part thereof in the year 1833, all the benefits and privileges provided by the act, entitled 'An act to grant pre-emption rights to settlers on the public lands,' approved the 29th of May, 1830, and which act was thereby revived. THE RESERVATION AND APPROPRIATION MENTIONED IN THE ACT OF THE 29TH OF MAY, 1830, MUST HAVE BEEN VALID AND SUBSISTING

AT THE DATE OF THE ACT OF THE 19TH OF JUNE, 1834, TO DEPRIVE THE DEFENDANTS OF THEIR RIGHT OF PREEMPTION."

The reservation to the Indians under the Menomonee treaties was valid and subsisting on the 19th of June, 1834; and neither Daniel Darnell nor Increase Claflin could be a legal settler or occupant.

Further in the case of Stark vs. Starr, 73 U. S. (6 Wall.), 402, among other things, the Court say:

"The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

If this be so and Daniel Darnell and Increase Claflin had no right to a patent and the land officers were without jurisdiction to give them such a patent, their purported patent is void.

That there may be a void patent as distinguished from a voidable one is clearly indicated by the United States Supreme Court in the case of Hughes vs. United States, 4 Wallace, 232, wherein the Court say:

"It was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress."

The fact that the issuing of a patent *was without authority, or was prohibited by statute*, can be raised in an action of this character, and the pleading of the lack of authority and the prohibition can not prejudice plaintiff. Again the pleading nowhere alleges fraud,

irregularity or mistake—but want of authority and action not authorized but prohibited by statutes, reservations and treaties.

Their patent is void. The officers of the land department, both local and general, were without authority or jurisdiction in the premises and their acts are ABSOLUTELY VOID.

"Whereby it appears that full payment has been made by the said Daniel Darnell according to the provisions of the act of Congress of the 24th of April, 1820."

* * * * *

It is apparent that the document on its face shows it is untrue and must be read in connection with the laws of the 29th of May, 1830, and the 19th of June, 1834; and in connection with the other laws and treaties relating thereto.

The matter in the answer which was stricken out by the Court was pleaded for the express purpose of alleging that the patent at the time of its execution was, and now is, absolutely void.

In Montgomery vs. Hernandez, 12 Wheaton, 129, the Court further took jurisdiction as to part of the case, though affirming the action of the state Court thereon,

and, among other things, upon this subject stated: "The only part of the case over which we can rightfully exercise appellate jurisdiction, is that raised by the supplemental answer."

In Fulton vs. M'Affee, 16 Peters, 149, the Court stated:

"* * * * * They were intended, therefore, with other evidence, to prove that this certificate was fraudulently and improperly obtained; that its authority had been denied by the commissioner of the general land office; and consequently, that it did not confer on the lessor of the plaintiff a valid legal title, upon which he could recover in ejectment."

Both the original entry in July, 1835, and the patent to Ellis as assignee of Darnell in 1838 at their dates and inception, respectively, were void and are void as distinguishable from voidable if the contention and claims of the plaintiffs in error are correct.

From Johnson vs. McIntosh, 8 Wheaton, 543:

"No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

* * * * * * * * * *

The same principle continued to be recognized. The charter granted to Sir Humphrey Gilbert, in 1578,

authorizes him to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

* * * * * * * * * *

Great part of New England was granted by this company, which, at length, divided their remaining lands among themselves, and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

* * * * * * * * * *

The King, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected till the revolution, when it was forfeited by the laws of war.

* * * * * * * * * *

After these states became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

* * * * * * * * * *

Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions, recognize and elucidate the principle

which has been received as the foundation of all European title in America.

* * * * * * * * * *

Public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he can not neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

* * * * * * * * * *

The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our Courts.

* * * * * * * * * *

The controversy between the colony of Connecticut and the Mohegan Indians, depended on the nature and extent of a grant made by those Indians to the colony; on the nature and extent of the reservations made by the Indians, in their several deeds and treaties, which were alleged to be recognized by the legitimate authority; and on the violation, by the colony, of rights thus reserved and secured. We do not perceive, in that case,

any assertion of the principle, that individuals might obtain a complete and valid title from the Indians.

* * * * * * * * * *

Much reliance has also been placed on a recital contained in the charter of Rhode Island, and on a letter addressed to the governors of the neighboring colonies, by the King's command, in which some expressions are inserted, indicating the royal approbation of titles acquired from the Indians.

* * * * * * * * * *

The impression this language might make, if viewed apart from the circumstances under which it was employed, will be effaced, when considered in connection with those circumstances.

In the year 1635, the Plymouth Company surrendered their charter to the crown. About the same time, the religious dissensions of Massachusetts expelled from that colony several societies of individuals, one of which settled in Rhode Island, on lands purchased from the Indians. They were not within the chartered limits of Massachusetts, and the English government was too much occupied at home to bestow its attention on this subject. There existed no authority to arrest their settlements of the country. If they obtained the Indian title, there were none to assert the title of the crown. Under these circumstances, the settlement became considerable. Individuals acquired separate property in lands which they cultivated and improved; a government was established among themselves; and

no power existed in America which could rightfully interfere with it.

* * * * * * * * * *"

Johnson vs. McIntosh, 8 Wheaton.

The Court must take judicial notice of the letter of Hon. Lewis Cass, then Secretary of War, to Gov. George B. Porter of Michigan, containing the instructions in reference to his conference with the Menomonies at Green Bay, and of what Secretary Cass states.

In the case of Hickie vs. Starke, 1 Peters, 94, the Court say:

"* * * * The plaintiffs produce a grant, legally and fully executed; but, to bring the case under the treaty, they must also prove that the ancestor or person under whom they claim was an actual settler on the 27th October, 1795." * * * *

As is stated in *Spalding vs. Chandler*, 160 U. S., 394, on pages 406 and 407:

"Whatever the reason, however, for the omission to make mention of the Indian reserve, the power existed in Congress to invade the sanctity of the reservation and disregard the guarantee contained in the treaty of

1820, even against the consent of the Indians, party to that treaty, and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of that act was to extinguish so much of the Indian reserve as was embraced in the grant to the state for canal purposes. Missouri, Kansas & Texas Railway vs. Roberts, *supra*, 116-117."

As is held in Spalding vs. Chandler, 160 U. S., 394, the mere executive officers of the government can not patent or make valid grants of land while such lands are subject to Indian rights of occupancy.

"In the case of Martin vs. Hunter's Lessee (1 Wheat., 304, 361), an exception was taken to the return of the refusal of the state Court to enter a prior judgment of reversal by this Court, because it was not made by the judge of the state Court to which the writ was directed; but the exception was overruled, and the return was held sufficient."

Worcester vs. Georgia, 6 Peters, 515, 539, 540:

"Constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect; that the said laws of Georgia are also unconstitutional and void, because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America, as above recited; also, that the said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control, the intercourse with the said Cherokee nation, which, by

the said constitution, belongs exclusively to the Congress of the United States." * * * * [Page 540.]

Upon the nature of the Indian title to lands in this country, as stated by Mr. Justice Clifford in the case of Holden vs. Joy, 17 Wallace, 211 (L. Ed. 21: 534), as follows:

"Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory, and claimed the right to govern themselves by their own laws, usages and customs. Guided by nautical skill, enterprising navigators were conducted to the New World. They found it, says Marshall, Ch. J., in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing. Expeditions were fitted out by all the great maritime powers of the Old World, and they visited many parts of the newly discovered continent, and each made claim to such part of the country as they visited. Dis-

putes arose and conflicts were in prospect. * * * *It gave the exclusive rigt to purchase, but did not found that right on a denial of the right of the possessor to sell.* Colonies were planted by Great Britain, and the United States, by virtue of the Revolution and the Treaty of Peace, succeeded to the extent therein provided to all the claims of that government, both political and territorial. Throughout, the Indians, as tribes or nations, have been considered as distinct, independent communities, retaining their original natural rights as the undisputed possessors of the soil, from time immemorial, subject to the conditions imposed by the discoverers of the continent, which excluded them from intercourse with any other government than that of the first discoverer of the particular section claimed. They could sell to the government of the discoverer, but they could not sell to any other governments or their subjects, as the government of the discoverer acquired, by virtue of their discovery, the exclusive pre-emption right to purchase, and the right to exclude the subjects of all other governments, and even their own, from acquiring title to the lands.

Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held * * * * under their original title." * * * *

Holden vs. Joy is a good authority to uphold the jurisdiction of this Court. It also declares the necessity of a ratification or confirmation of void grants and ratification or confirmation by all parties in some form of a treaty which for any reason was not validly made and ratified.

Holden vs. Joy, 17 Wallace on pages 251 and 252.

Worcester vs. Georgia, 6 Peters, 515, is followed, historically, as to policy of government in making, and the result of, treaties between the United States and the Indians.

In respect to the power to make treaties, Mr. Justice Clifford in the case of Holden vs. Joy, 17 Wallace, 211 (L. Ed. 21: 534), said:

"Express power is given to the President, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur and, inasmuch as the power is given in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the states and the United States. Holmes vs. Jennison, 14 Pet., 569; 1 Kent, Com., 166; 2 Story, Const., Sec. 1508; 7 Hamilton's Works, 501; Duer, Jur., 229."

Further from same case (L. Ed. 21: 535), in regard to issuance of a patent provided for by terms of a treaty:

"Suppose that is so, still it insisted that the President and Senate, in concluding such a treaty, could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the

consent of Congress, which can not be admitted. U. S. vs. Brooks, 10 How., 442; Meigs vs. McClung, 9 Cranch, 11. On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political. Wilson vs. Wall, 6 Wall., 89 (73 U. S., XVIII., 729); Ins. Co. vs. Canter, 1 Pet., 542; Doe vs. Wilson, 23 How., 461 (64 U. S., XVI., 585); Mitchell vs. U. S., 9 Pet., 749; U. S. vs. Brooks, 10 How., 460; Kansas Indians, 5 Wall., 737 (72 U. S., XVIII., 667); 2 Story, Const., Sec. 1508; Foster vs. Neilson, 2 Pet., 253; Crews vs. Burcham, 1 Black, 356 (66 U. S., XVII., 92); Worcester vs. Ga., 6 Pet., 562; Blair vs. Pathkiller, 2 Yerg., 407; Harris vs. Barnett, 4 Blackf., 369."

Section 1 of Chapter 215, Laws of Wisconsin for 1895, as amended by Section one (1) of Chapter 183, Laws of 1897, reads as follows:

"Section 1. No appeal shall hereafter be taken to the Supreme Court in any case from any judgment when the amount involved, exclusive of costs, is less

than one hundred dollars, unless the title to lands shall therein be in question, or the judge of the Court in which such judgment was rendered shall certify that the case necessarily involves the decision of some question or point of law of such doubt and difficulty as to require a decision of the same by the Supreme Court, or that it necessarily involves the construction or interpretation of some provision of the constitution of the United States, or of the constitution of this state; and in all cases the question or questions so certified shall be briefly and clearly stated by such judge, and on the appeal no other question shall be considered or decided."

Here in this "Jones Island" case, the answer sets forth matters with respect to which a patent can be collaterally impeached. The plaintiff is not injured by the pleading of these, the defendants have the right to attempt to prove these (not to contradict the records of the land department because the records thereof prove the facts pleaded); but in order to show the absolute lack of jurisdiction of the officers of the department to issue such a patent and that it is void. The plaintiff has no right of possession under a void patent. That is

a good defense. This Court on a motion to strike out can not assume that the defendants are trespassers as asked by plaintiff's counsel. There is no such state of facts before the Court. By no process of legal construction has the Court any right on the pleadings on a motion to strike out to assume such a fact. The defendants need not plead why they are in possession, they are in possession and that is a matter between them and the United States, if their contention is correct. Further it is a matter of proof in defense. The plaintiff, which is in Court merely because by a legal fiction its existence and legality can not be collaterally attacked, can not well ask to be put into possession of property, it does not own, upon a void patent. The facts are pleaded as one has a right to plead them under the Wisconsin statutes and Wisconsin decisions; and the plaintiff has no good reason to have the same stricken out on a motion. This is so regardless of what the Court might do upon the introduction of all evidence and the determination of the exact status of all the parties. It was never intended to try law suits on motions to strike out.

The Wisconsin cases and statutes are believed to sustain this contention.

Pennoyer vs. Allen, 50 Wis., 308, 310.

Weld et al. vs. The Johnson Manufacturing Company, 86 Wis., 552, 562.

Dobbs vs. Kellogg, 53 Wis., 448, 451, 452.

Brown vs. Cohn, 88 Wis., 627, 634.

Sec. 3078, Vol. 2, page 1764, Sanborn & Berryman's Annotated Statutes of Wis.

See page 356, Vol. 1, Boone on Code Pleading, par. 185.

Section 2657 R. S. Wis., page 1540, Vol. 2, S. & B. Ann. St. Wis.
Lombard vs. Cowham, 34 Wis., 486, 493.

The case of United States vs. Schurtz, 102 U. S., 378, seems to me clearly distinguishable from these "Jones Island" cases and not in point. *The land was subject to entry in that case under existing laws* and the controversy involved was an application by corporate authorities of the city of Granville to cancel the McBride's entry and such application was made before the local land officers some time prior to the issuance of the patents. In respect to the issuance of the patent before final determination of the appeals, the Court points out the remedy. It seems to me that the points we rely upon in the Jones Island cases come within the exceptions as to the binding character of the acts of the officers of the land offices.

It is further significant upon the question of entry that, under the rule of Quinly vs. Conlan, 104 U. S., 420, neither the Illinois Steel Company, Daniel Darnell or any of its supposed (?) predecessors ever made a valid entry. The entry and possession of the Islanders (the defendants herein) so far as shown by the pleadings was and is peaceable and equally as valid as that of the defendants in the case of Carter vs. Ruddy, 166 U. S. 493.

It might be well to be kept in mind that the U. S. Supreme Court attached no importance, legal or equitable, in the case of Burfenning vs. Co., 163 U. S., 321, to the fact that the "float" entryman had paid the necessary government price for the land. If the position of the Jones Island defendants in this brief is

correct, then the supposed tax titles of the Illinois Steel Company are waste paper and worthless. The facts pleaded are important in this respect.

Hussman vs. Durham, 165 U. S., 144.

This court cannot hold upon the pleadings that the plaintiff is in constructive possession.

Carter vs. Ruddy, 166 U. S., 493.

From treaty with Menominie and other tribes at Prairie des Chiens, proclaimed February 6, 1826 (p. 155-160, 159, Revision of Indian Treaties):

"Article 10. All the tribes aforesaid acknowledge the general controlling power of the United States, and disclaim all dependence upon, and connection with, any other power. And the United States agree to, and recognize, the preceding boundaries, subject to the limitations and restrictions before provided. It being, however, well understood that the reservations * * * * *are not claimed by either of the said tribes.*"

This is a case that involves the construction of the Constitution of the United States.

This Island has been occupied from twenty to thirty years by several of these fishermen. Others have settled from time to time, coming to the Island from different parts of Germany at the solicitations of the first settlers. The Island was a narrow strip of low land, known as "Jones Island", bordered on the west by the Milwaukee river, on the east by Lake Michigan, on the south by the plant of the Illinois Steel Company and on the north by the new outlet of the Milwaukee harbor. The old outlet of the Milwaukee harbor was between this land and the plant of the Illinois Steel Company, which outlet was gradually filled in by washings from the lake and by the work of these people in filling in with stones, ashes, barrels and soil procured from elsewhere in the city. The part known as "Jones Island" was almost wholly covered by water until some of these people between twenty and thirty years ago began to reclaim it by filling it, protecting it on the lake side with obstructions made of barrels filled with stone, sunk in the ground to prevent the waves from washing the soil away. These barrels gradually retained the soil washed from the lake and other barrels filled with stone were extended further into the lake. The settlers were assisted in reclaiming this land from the lake by the fact that the waters of Lake Michigan have lowered. The land thus reclaimed has been covered by ashes and soil brought in boats from the city. The low land next to the river was reclaimed in the same manner.

Upon this ground the settlers have built their houses and fishing shanties. This fishing business has grown into an industry furnishing the only support for about two hundred families who live on this land.

It is only within a few years that the Illinois Steel Company made any claim to the Island.

Within the last two years the Illinois Steel Company has brought ejectment suits against these settlers. There are now upon the present calendars of the Circuit and Superior Courts of Milwaukee County nearly one hundred and fifty of these cases. In each of these cases the Court has stricken from the answers the allegations corresponding to the ones stricken out by Judge Seaman in the Circuit Court of the United States.

These courts insist that these cases shall be tried the latter part of this month, if called. The cases are likely to be called at that time or during the first week in March.

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